

IN THE
United States Circuit Court of Appeals
FOR THE
NINTH CIRCUIT.

UNITED STATES OF AMERICA,
Appellant,
vs.
WILLIAM A. MAHAFFEY,
Defendant,
NELSON COOPER,
Appellee.

BRIEF OF APPELLANT.

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STATEMENT OF THE CASE.

This is an appeal from the decree entered by the District Court of the United States for the District of Montana, on the 31st day of July, 1915, in favor of the appellee and against the appellant and dismissing the appellant's bill of complaint (Tr. p. 37).

This action was commenced by the appellant against the defendant William A. Mahaffey for the

purpose of having cancelled and set aside, on the ground of fraud, a certain patent for lands theretofore issued to the defendant, the bill of complaint having been filed on December 7th, 1909.

The bill of complaint (Tr. pp. 2-16), alleges in substance; that the appellant was, prior to the 27th day of April, 1899, the owner in fee of certain lands situated in the state and district of Montana, and that on the 27th day of April, 1899, the defendant, William A. Mahaffey, entered said lands under the homestead laws by making and filing in the United States land office at Helena, Montana, his application to enter said lands together with a homestead affidavit and a non-mineral affidavit (Tr. pp. 2-5); that after the expiration of five years he made and submitted to the land office final proofs thereon, consisting of his own affidavit and deposition and the affidavits and depositions of two witnesses, and received from the officers of the land office a final receipt and certificate, and thereafter on the 31st day of December, 1904, a patent was issued to him by the United States for said lands (Tr. pp. 5-9); that in said final proof affidavits and depositions the defendant and his two witnesses testified and stated that the defendant had actually resided on said lands continuously since June, 1899, and that he had placed improvements upon said land of the value of \$300.00, and that he had constructed a house upon said land sixteen feet by eighteen feet, and had constructed a wire fence around said land and had constructed corrals thereon (Tr. pg. 7);

that the final proof affidavits and depositions of the defendant and his two final proof witnesses were false, fraudulent and untrue, as was then and there well known to the defendant and said final proof witnesses, in this, that the defendant had not established his residence upon said lands, or any portion thereof, during the month of June, 1899, or at any other time or at all, and that the defendant had not, at the time of the making of said final proofs, resided on said lands, or any part thereof, continuously, or in any other manner, or at all, since the month of June, 1899, or at any other time or at all, and had not then, or at any other time, built a house sixteen feet by eighteen feet, and that he had not fenced said lands with a fence, and had not built any corral or fence whatever, and that he did not then and there, or at any other time, have improvements upon said lands of the value of \$300.00, or any other value or amount whatever (Tr. pp. 10-11); that the officers and agents of the United States, believing the statements contained in the final proof affidavits and depositions of the defendant and his two final proof witnesses, were misled and deceived thereby, and were thereby induced to issue said final receipt and certificate and said patent (Tr. pp. 12-13).

On March 26th, 1915, an order pro confesso was entered as to the defendant Mahaffey (Tr. pp. 24-25).

On September 4th, 1912, Nelson Cooper filed his petition to intervene in said cause (Tr. pp. 25-30), and thereafter on December 20, 1912, filed his amended answer in intervention (Tr. pp. 31-35).

The answer in intervention admits the allegations of the bill of complaint with reference to the ownership of the land, the entry by the defendant, the making of the final proof on said entry and the issuance of the final receipt and certificate and the issuance of patent to the defendant, but denies that the proofs with reference to establishment of residence, upon the lands by the defendant, his residence thereon, and the kind and value of the improvements made thereon were false, fraudulent or untrue (Tr. pp. 31-32).

The answer in intervention also alleges, in substance; that after the defendant Mahaffey had made his final proof, and while he was in possession of said land, the intervenor, in good faith and for a valuable consideration paid by him to the defendant, and without any notice or information that the defendant Mahaffey had not, in all things, complied with the homestead laws and without notice or information that the complainant claimed that said Mahaffey had not, in all things, complied with the homestead laws, purchased the said lands from said defendant Mahaffey, and the said Mahaffey executed a deed conveying said lands to the intervenor and delivered the same to the intervenor and received the purchase price for said lands (Tr. pg. 33); and that at the time the intervenor purchased said lands, paid the consideration therefor, and received the deed thereto, he had no notice or information that the defendant had not, in all things complied with the law in procuring title to said lands, or that the complainant claimed that there was any fraud com-

mitted by the said Mahaffey in procuring title to said lands (Tr. pg. 34).

The answer in intervention also alleges that after purchasing said lands he entered into a contract to sell and convey the same to one George Heaton for a valuable consideration, which was paid to the intervenor by said Heaton, and that said Heaton is in possession of the said lands under said contract (Tr. pg. 34).

To the answer in intervention a replication was filed by the complainant on December 23rd, 1912 (Tr. pp. 35-36).

On July 1, 1915, said cause came regularly on for trial before the court, evidence being introduced by complainant and intervenor (Tr. pp. 44-102), and said evidence having been considered by the court, the court, on July 30, 1915, duly rendered and filed its decision and opinion in said cause (Tr. pp. 33-42), and on July 31, 1915, a decree was duly made and filed in said cause in favor of the intervenor and against the complainant and dismissing the complainant's bill of complaint (Tr. pg. 37).

With the petition for appeal the following assignment of errors was filed (Tr. pp. 104-5).

ASSIGNMENT OF ERRORS.

1. The court erred in finding the evidence taken in said cause, at the trial thereof, was insufficient to sustain the allegations of the bill of complaint;
2. The court erred in ordering a decree herein in

favor of the defendant and intervenor and against the complainant, dismissed the complainant's bill of complaint;

3. The court erred in entering a decree herein in favor of the defendant and intervenor and against the complainant, dismissing the complainant's bill of complaint.

ARGUMENT.

There are only two questions to be determined on this appeal. One whether or not the evidence is sufficient to sustain the allegations of the bill of complaint with reference to the fraud of the entryman and defendant Mahaffey, and the other whether or not, if the evidence is sufficient to sustain the allegations of the bill of complaint, the evidence introduced by the intervenor in support of the allegations of the answer in intervention is sufficient to sustain the same and show the intervenor to have been a purchaser in good faith for a valuable consideration without notice of the fraud committed by the defendant entryman.

In order to determine whether or not the court erred in finding and holding that the evidence was insufficient to sustain the allegations of the bill of complaint it is necessary to examine and analyze the evidence introduced by the complainant.

The complainant introduced in evidence the affidavits and depositions made and given by the entryman Mahaffey and his witnesses before the register

of the Great Falls land office on June 15, 1904, in support of the entryman's final proof (Tr. pp. 63-71).

In the final proof affidavit and deposition of the entryman (Tr. pp. 68-70), he stated that he built the house on the land in June, 1899, and settled and established his residence on the land at that time (Tr. pp. 68-69); that the house was 16x18 feet, and that the land was all fenced, a corral on the land and all of the improvements were worth \$300.00 (Tr. pg. 69); that he had resided on the land continuously since establishing his residence thereon in June, 1899, and had never been absent therefrom (Tr. pg. 69).

In the final proof affidavit and deposition of the final proof witness Charles Gilbert (Tr. pp. 63-65), he stated that the entryman Mahaffey built his house on the land in June, 1899, and at the same time settled on the land and established his residence thereon (Tr. pg. 64); that the entryman had resided continuously on the land since June, 1899, and had never been absent therefrom (Tr. pg. 64); that the entryman had a house and corral on the land and the land was all fenced, all of the improvements being worth \$300.00 (Tr. pg. 64);

In the final proof affidavit and deposition of the final proof witness Charles Wise (Tr. pp. 65-67), he stated that the entryman settled on the land, established his residence thereon and built his house thereon in June, 1899 (Tr. pg. 66); that the claimant had lived on the land since June, 1899, and had never been absent therefrom (Tr. pg. 66); that the entryman had a house and corral on the land and the land was all

fenced and all of the improvements were worth \$300.00 (Tr. pg. 67).

The bill of complaint alleges that the foregoing testimony of the entryman and his final proof witnesses was false, fraudulent and untrue, and alleges:

1. That the entryman Mahaffey did not establish his residence on the land in June, 1899, or at any other time or at all;

2. That at the time of making the final proofs Mahaffey had not resided on the land continuously, or in any other manner or at all, since June, 1899, or at any other time;

3. That he had not built a house 16x18 feet on the land;

4. That he had not enclosed the land with a fence;

And to support these allegations of the bill of complaint the complainant introduced the following evidence;

W. L. Kinsey, a witness called on behalf of the complainant, testified, in substance, as follows (Tr. pp. 44-48);

That he first saw the land in March or April, 1904; from March or April, 1904, up to the middle of June, 1904, he saw the land several times, riding over it for stock; that during the next few years after June 15, 1904, he had occasion to be on the land frequently and pass by it frequently; that when he first was on the land in the spring of 1904, there was on the land an old log cabin with holes cut in it for a door and

window, but without any door, window or floor; it was constructed of logs with cracks in it (Tr. pg. 45), and was not chinked between the logs, and there was no stove pipe in the roof (Tr. pg. 45); it had a board roof which was not battened or anything; it was not habitable or fit for a person to live in because there was no door and no window in it and the cracks were in the sides so you could put your fingers through; that when he first saw it in 1904, he was not inside of it but just up to it; at that time there was no evidence that any one lived in it, and there was no fencing on the land; that between April, 1904, and the middle of June, 1904, no fencing was done on the land, and that during that time he was on the place every few days; during that time he could pass back and forth over the land while driving stock and his stock ranged all over it at that time (Tr. pg. 46); that he lived near the land and his stock ranged over that country; that he has lived in the neighborhood since 1904 and rode all over the land frequently; that there was a fence east of the land on what was known as the Cooper land, that was all; that he was near the house quite a number of times; that there was no chinking between the logs; that he saw no other buildings on the land except some lambing pens Cooper had on the land; that he knows they belonged to Cooper because Cooper's men were working there and the foreman was working with the men (Tr. pg. 47); that he never saw Mahaffey on the land; that he lived about one and one-half miles from the land across country,

and in June, 1904, gathered berries right on the land (Tr. pg. 48).

John Gardispee, a witness called on behalf of the complainant, testified, in substance, as follows (Tr. pp. 48-51);

That he saw the land in 1902, 1903 and 1904; that he first passed by the land in 1902 and there was a cabin on it then and that was the only cabin he ever saw on the land except some lambing pens; that it was a small log cabin about ten by twelve feet with a board roof on it the first time he saw it; it had a dirt floor and no door or windows; holes were cut for a door and a window, but no door or window in it; that it was in May, 1902, when he first saw the land, and from that time until the middle of June, 1904, he was through the land quite frequently hunting coyotes and going over to help them around doing some work; that when he first saw it in 1902 he did not notice any chinking in it and he could see daylight through it; that from May, 1902, when he first saw it up to the middle of June, 1904, the cabin was not changed, except that the roof was taken off; that he never saw Mahaffey on the land, never saw him but once and that was when he was cooking for Cooper; that he never saw anyone living on the place or in the cabin; that between May, 1902, and the middle of June, 1904, he did not see any evidence around the cabin of any one living there (Tr. pg. 49); that he never saw any fence on the place except a fence on one side of the land (Tr. pp. 49-50); that up to the middle of June, 1904, the land was never

fenced and there was a road through it, the land remaining in the same condition all of that time (Tr. pg. 50); that he lived about three miles from the land; that the land does not lie on any public road, but there was a road going through there to Sun River where he traded; that he passed through the land in 1902, 1903 and 1904, going to Sun River (Tr. pg. 50); that he first saw the cabin in 1902, and saw it in 1902, 1903 and 1904; there was a roof on it when he first saw it; he was at the door, but never went inside of the cabin because he could see inside; he saw no other improvements on the land except the lambing pens; there was a reservoir east of the house which was built after he went there in 1904 or 1905 (Tr. pg. 50); there was a fence on the east side of the land; he passed the place hunting coyotes for Frank Cooper; they told him there was a lot of coyotes around the place and he used to ride by there when hunting; he was not working for Cooper, but was hunting coyotes for the bounty (Tr. pg. 51).

John Gardispee Jr., a witness called on behalf of the complainant, testified, in substance, as follows (Tr. pp. 51-53);

That he knew Mahaffey and first saw the land along about April, 1902; that for the next three or four years his home was about two or three miles from the Mahaffey land; that after April, 1902, for the next two or three years he was through the land several times, pretty often; he was across the land hunting cattle and horses and the cattle and horses ran in there on

that land; that for the next two or three years after 1902, he knew of only one fence, the north and south line fence on the east side (Tr. pg. 51); that there was no fence enclosing it so as to keep stock out and it was open so that stock could range all over it; when he first saw the place in 1902 there was a cabin on it, an old log cabin ten by twelve feet or something like that; it had a board roof but does not think it was chinked; there were holes for doors and windows but no doors or windows that he knew of; it had a dirt floor; in 1902 when he first saw the cabin it was not fit for anyone to live in and no one was then living in the cabin; from 1902 up to the middle of June, 1904, the place was never fenced so that he could not ride back and forth across it and during all of that time it remained open (Tr. pg. 52); he saw the cabin when he first went there, stopped and looked at it and went in it; when he first saw it there was a single board roof on it; he never saw Mahaffey there and was there pretty frequently during those years (Tr. pg. 53);

Frank Kinsey, a witness called on behalf of the complainant, testified, in substance, as follows (Tr. pp. 56-59);

That he had been over the Mahaffey land before 1904, but did not become acquainted with the land until the spring of 1904, about the fore part of April, when he first saw the cabin; he had been over the land about a year before that; the cabin was built of logs that were two or three inches through, or something

like that; it had no roof on it and no doors or windows, and there had never been any in it; it was not chinked between the logs and the spaces between the logs were two or three inches; it had no floor and while there were holes cut for a door and window there was no door or window put in; that he could tell from his examination that there had never been any door or window casing in it; that he was on the claim several times from the time he first saw the cabin up to the time Mahaffey made final proof; at the time final proof was made the cabin could not have been inhabited at all it was in such a condition that it could not have been used for living purposes; that before final proof was made he never saw any other improvements on the place, no buildings or fences of any kind; he was back and forth across the land while driving and hunting stock, it was open range (Tr. pg. 57); it was open so that stock of all kinds ranged back and forth across the land (Tr. pp. 57-58); he never saw Mahaffey on the land at any time prior to the time he made final proof (Tr. pg. 58); he lived about two and one half miles from the land; first saw the cabin the first part of April, 1904, and at that time there was no roof on it and no door and no fences; there was a fence east of there, but that fenced in the Crown Butte Ranch where Mahaffey was working; that he had been all over the land frequently; that he had been over the land before 1904, but 1904 was the first time he ever paid any particular attention to the claim or to the house (Tr. pg. 58).

W. E. Bennett, a witness called on behalf of the complainant, testified, in substance, as follows (Tr. pp. 54-56);

That during the year 1909, he was a Special Agent for the General Land Office; that he made an examination of the Mahaffey homestead entry in July, 1909; that he found a log cabin on the place at that time ten by twelve feet; it was unchinked and left considerable space between the logs; there was no floor in the cabin and no door or windows, although the holes had been cut in the logs for both a window and door; the roof was a single board roof; at that time all of the entry was under enclosure, not fenced by itself, but the fence was where it just touched the place if it touched it at all, but the place was not fenced, the fence stood on some adjoining land; there was no floor in the cabin, the cabin was not chinked and holes were cut for a door and window and no door or window in it, and there was no frame even in the space for the door; I examined the door and window openings to ascertain whether there had ever been a door or window put in and could see that there was no evidence that any door or window frame had ever been put in (Tr. pg. 55); the land was enclosed with land known as the Cooper field, and there was no public road through there although there was a trail there which was followed to go through that section of the country (Tr. pg. 55); that he was there about the 5th or 6th of July, 1909, with W. L. Kinsey; the cabin was ten by twelve feet and I must have measured it

because that was my report of the matter (Tr. pg. 55); to the best of his recollection it did not have cross pieces to support a floor, but he would not swear positively as to that; it was not chinked and had no door or window; as to how the fence was with reference to the lines he was unable to say at this time, but he knew at that time positively because he ran out those fences; the land was in Cooper's enclosure, I know that; there was not any question about this being Cooper's enclosure; no one told me that, I knew it (Tr. pg. 56).

We submit that the evidence of these witnesses is sufficient to sustain the allegations of the bill of complaint in every respect.

With reference to the establishment of residence and residence of the entryman Mahaffey on the land the evidence was in substance as follows:

W. L. Kinsey testified that he lived about one and one-half miles from the Mahaffey entry (Tr. pg. 48); that he first saw the cabin in March, 1904, and between that time and the middle of June (when Mahaffey made his final proof), he was on the place frequently (Tr. pg. 45), every few days (Tr. pg. 46); that there was an old log cabin on the place which had holes for a door and window but no door or window and no floor (Tr. pg. 45); there was no chinking between the logs and no stove pipe (Tr. pg. 48); that it was not habitable or fit for a person to live in (Tr. pg. 46); that between April, 1904, and the middle of June,

1904, he was on the place every few days and never saw Mahaffey on the place.

John Gardispee testified that he lived about three miles from the land (Tr. pg. 50); that he saw the land in 1902, 1903 and 1904; that there was a small cabin on it about 10x12 the first time he saw it (Tr. pg. 49); that the cabin had a dirt floor, holes cut for a door and window, but no door or window in it (Tr. pg. 49); that from the time he first saw it up to the middle of June, 1904, he was on the place frequently (Tr. pg. 49); when he first saw the cabin in 1902 there was no chinking between the logs and he could see daylight through it (Tr. pg. 49); from the time he first saw the cabin in 1902 up to the middle of June, 1904, there was no change in the cabin, except that the roof was taken off (Tr. pg. 49); that he never saw Mahaffey on the place or any evidence of anyone living in the cabin (Tr. pg. 49).

John Gardispee Jr. testified that he lived two or three miles from the Mahaffey homestead (Tr. pg. 51); that he first knew the land in April, 1902, and for the next two or three years went over the land frequently hunting stock which ranged across the land (Tr. pg. 51); when he first saw the cabin in 1902 it was an old log cabin about 10x12 feet with a board roof, not chinked, with holes cut for a door and a window but without a door or window and with a dirt floor (Tr. pg. 52); that it was not fit for anyone to live in and no one was living in the cabin or on the land (Tr. pg. 52); that from 1902 up to the mid-

dle of June, 1904, he never saw anyone living in the cabin or on the land and never did see the entryman Mahaffey on the place although witness was on the land frequently, probably once a month (Tr. pg. 52); that the first time he saw the cabin in 1902 he stopped and looked at it and went inside (Tr. pg. 53).

Frank Kinsey testified that he lived about two and one-half miles from the Mahaffey land (Tr. pg. 58); that he first saw the cabin in the fore part of April, 1904 (Tr. pg. 57); at that time it had no roof on it and no door or window in it and there never had been any in it (Tr. pg. 57); that it was not chinked and had spaces between the logs of two or three inches (Tr. pg. 57); there was no floor in it and there were holes cut for a door and window with none in it (Tr. pg. 57); that he could tell from his examination that there never had been any door or window casings in the cabin (Tr. pg. 57); that between the time he first saw the cabin and the time Mahaffey made his final proof witness was on the place several times (Tr. pg. 57); that at the time Mahaffey made his final proof the cabin could not have been inhabited as it was in such a condition it could not have been used for living purposes (Tr. pg. 57).

Two of these witnesses, John Gardispee and John Gardispee Jr., knew the land and cabin from April, 1902, up to the middle of June, 1904, when the entryman Mahaffey made his final proof, while the other two knew the land and cabin from the first part of April, 1904, up to the time of the making of such

final proof. All of them were on and over the land and passed by the cabin frequently during the time they knew it, and they all agree as to the condition of the cabin, that it was unchinked, without doors or windows and with a dirt floor, and was not habitable or fit to live in, and none of them ever saw the entryman Mahaffey on the place at any time.

W. E. Bennett, who was a Special Agent of the General Land Office, made an examination of the land and cabin in the early part of July, 1909. He testified that he found on the land an old log cabin 10x12 feet; that it was unchinked with considerable space between the logs; that there was no floor in the cabin and no doors or windows although holes had been cut in the logs for both a door and window (Tr. pg. 55); that there were no door or window frames in the cabin and that he examined the door and window openings for the purpose of ascertaining whether there had ever been a door or window put in and could see that there was no evidence that any door or window had ever been put in the cabin (Tr. pg. 55).

The testimony of the witness Bennett shows that in July, 1909, when he made his examination, the cabin was in exactly the same condition as the testimony of the witnesses Gardispee, Gardispee Jr., W. L. Kinsey and Frank Kinsey shows the cabin to have been in for a number of years prior to and at the time the entryman Mahaffey made his final proof.

The intervenor introduced four witnesses for the purpose of showing that the cabin was in a habitable

condition and that the entryman resided on the entry.

Frank D. Cooper, father of the intervenor, and who purchased the land for the intervenor, testified that he lived at Mission Creek between 7 and 9 miles from this land (Tr. pg. 74); that in 1900 he saw Mahaffey on the place; that he saw the cabin at that time and went into it and described the condition of the cabin (Tr. pg. 75); that passing on the road he would see Mahaffey on the place (Tr. pg. 78); but he was unable to give any idea of the number of times he passed the place or during what years (Tr. pg. 78); that after he purchased the land for his son he was not down on the place for a long time, two or three years (Tr. pg. 79); that when he finally did go down he found the same cabin that was there when he was on the place in 1900 (Tr. pg. 79).

William Kirkland testified that from 1900 to 1910 or 1911 he was in the employ of Frank D. Cooper; that he was at the cabin on the place but could not remember whether it was in the spring of 1904, but thought it was before that (Tr. pg. 93); he described the condition of the cabin (Tr. pg. 93); that he did not say Mahaffey lived there at that time and that he never did see Mahaffey on the land (Tr. pg. 93).

Richard T. Loss testified that there was a cabin on the place which was daubed or pointed up with a stove pipe through the roof and with a window and a door in it (Tr. pg. 94-95); on cross-examination he testified that from the time Mahaffey filed on the land

up to the time he made final proof witness was across the land several times (Tr. pg. 95); on further cross-examination stated that he was there two or three times (Tr. pg. 95); and finally admitted that he really was only by the place twice (Tr. pg. 95); and that both of these times was in 1903 or 1904, before Mahaffey made final proof, and that he saw Mahaffey there twice (Tr. pg. 95); that he saw Mahaffey around but did not pay much attention to him and was not down to the cabin (Tr. pg. 95).

Charles Wise testified that he had been on the land but could not remember the date (Tr. pg. 96); that he saw Mahaffey living on the land (Tr. pg. 96); that he was on the land three or four times altogether while he was living there, all of these visits being in one year; that he stayed there about a week or five days altogether, ate there and slept there (Tr. pg. 96); that there was a reservoir on the land and that he worked on it, helped on it three or five days (Tr. pg. 97). On cross-examination the witness stated that all of his visits were made during one year and it seemed to him like it was 1905 (Tr. pg. 97); that he was there perhaps a half dozen or three or four times that year, and that it was along in the fall when he was there (Tr. pg. 98); that he thought it was after he made his final proof that he was there (Tr. pg. 98).

Charles Wise was one of the final proof witnesses for the entryman Mahaffey (Tr. pp. 65-67); and in that affidavit and deposition the witness testified that

Mahaffey in June, 1899, settled, built the house and commenced residence on the land (Tr. pg. 66); and that Mahaffey had lived on the land since June, 1899 (Tr. pg. 66); and that Mahaffey had not been absent from the land (Tr. pg. 67).

Now if the witness Wise testified to the truth on the trial of this case, all of his visits were during one year, which he thought was in 1905, and after Mahaffey made final proof, and he could not and did not know when Mahaffey built his cabin, or when he settled upon and commenced to reside on the land, or that he had resided continuously thereon and had never been absent therefrom. If the testimony which this witness gave on the trial of this case was true then the testimony which he gave as a final proof witness was false, or, to say the least, he testified positively to facts regarding which he had no knowledge whatever.

It may be contended that Wise was mistaken as to the time he was on the land and helped construct the reservoir, and which he fixed as being in 1905 as he thought. If he was ever on the land at any time it must have been 1905, and after Mahaffey had made his final proof. The witness John Gardispee testified that the reservoir was built after he first saw the place and it must have been in 1904 or 1905 (Tr. pg. 50). Wise says he thinks it was after final proof and in 1905 he worked on the reservoir (Tr. pg. 97 and pg. 98). In the final proofs the claimant and his two witnesses were asked to describe the improvement

which had been made on the place and give the value of the same. The final proof witness Gilbert testified that the improvements consisted of a house, corral, land all fenced, improvements worth \$300.00 (Tr. pg. 64); the final proof witness Wise testified that the improvements consisted of a house, corral, land all fenced, improvements worth \$300.00 (Tr. pg. 67); while the entryman Mahaffey testified that the improvements consisted of a house, corral, land all fenced, improvements worth \$300.00 (Tr. pg. 69). Neither of the final proof witnesses nor the entryman described a reservoir as being among the improvements placed on the land, and certainly if the reservoir had been constructed at that time it would have been included among those improvements. Possibly, of course, one or both witnesses might have failed to mention it, but certainly the entryman himself would have included it. And in view of this final proof testimony the testimony of Wise fixing the time as being in 1905, when he was on the land, must have been correct.

The witness Frank D. Cooper testified that he saw the cabin in 1900, the witness Kirkland testified that he thought it was before 1904 that he saw it, the witness Loss testified that he was past the land twice in 1903 and 1904 and saw the cabin, while the witness Wise testified he saw the cabin several times all during one year which he thought was 1905, after Mahaffey had made final proof, and all of these witnesses testified that the cabin had doors and windows and was chinked or daubed up, some of them testify-

ing that it had a floor in it. Yet when the witness Bennett examined the cabin in July, 1909, it had no floor, was not chinked up, had no door or window and no door or window casings, and that he could not find, on examination, an evidence that there had ever been any door or window in it. His evidence corroborates the evidence of Frank Kinsey who testified that before Mahaffey made final proof he examined the cabin and could find no evidence that there had ever been any door or window in it (Tr. pg. 57). Certainly if, as late as 1904 or 1905, there had been a floor in the cabin, door and window casings and a door and window in it, and it had been chinked and daubed up there could not possibly have been such a change in the cabin between those years and 1909, when Bennett examined it, as Bennett found on his examination. There would have been some evidence in the logs or nails or nail holes used to fasten in the door and window casings and the doors and windows. The door and window casings and the doors and windows might have been removed and taken away and the nails which fastened them in might have been pulled out, but the nail holes would have remained. Cooper testified that "There is none of these places unless you have a man on them that would remain the same. They would soon carry it off. There was not a place but what I had some trouble with it. Everything was practically taken off except the house." (Tr. pg. 84). And while it is possible that in that particular neighborhood the residents may

have been extremely light fingered and would steal everything that was not nailed down and many things which were nailed down, yet it is going just a trifle too far to ask us to believe that in this particular instance they even stole the nail holes out of the logs. And it is exactly the same with reference to the floor in the cabin. If there had ever been a floor in it and had been removed, certainly in 1909 there would be some evidence that the floor had been in the cabin at one time and had been removed. And with reference to the chinking between the logs, if it had been chinked up as late as 1904 or 1905 so as to render it habitable, all of this chinking would not have entirely disappeared by 1909, leaving no evidence whatever behind that it had been chinked at one time.

The evidence of the two Gardispees and the two Kinseys as to the condition of the cabin prior to and at the time final proof was made, as corroborated by the evidence of Bennett, which is not disputed or contradicted in any manner whatever, shows clearly that the entryman Mahaffey was not living in the cabin, and that it was not, at the time the entryman made final proof, and never had been, prior to that time, in a habitable condition or fit to be used for living purposes, and there being no other buildings on the place, he could not have resided on the land continuously from June, 1899, up to the time of making final proof.

Considering all of the testimony introduced on the trial of the cause with reference to the condition of the cabin on the land and the entryman's residence

on the land, we have, on one side the testimony of the two Gardispees, who lived within two or three miles of the land and knew the land and cabin from April, 1902, who were on the land every few days, and who testified as to the uninhabitable condition of the cabin during all of that time, and who, although on the land and at the cabin frequently during those years, never saw Mahaffey on the place; the testimony of the two Kinseys who lived between one and two miles from the land and knew the land and cabin from the first part of April, 1904, who were on the land and at the cabin many times before final proof was made by Mahaffey, and who testified as to the cabin being without doors, windows or a floor, and who, in all of their visits to the land, never saw the entryman on it; and the testimony of Bennett, which corroborates the testimony of the two Gardispees and the two Kinseys regarding the condition of the cabin. On the other hand we have the testimony of Frank D. Cooper who was at the cabin one time between 1899 and 1906 or 1907; the testimony of Kirkland who was at the cabin one time between 1899 and 1904, but never did see the entryman on the land; the testimony of Loss who was past the land twice in 1903 or 1904; and the testimony of the witness Wise who testified that he was on the land several times, all during one year which he thought was 1905, and whose testimony is discredited by the testimony given by him when he was a final proof witness.

We submit that, taking into consideration the

number of times the various witnesses were on the land, their opportunities for observing the condition of the cabin, their opportunities for seeing the entryman if he was residing on the land, the testimony of the witnesses, the two Gardispees and the two Kinseys, when corroborated by the testimony of the witness Bennett as to the condition of the cabin, shows conclusively that the cabin on the land had never been placed in a habitable condition and that the entryman Mahaffey never did reside on the land.

With reference to the enclosing of the land with a fence by the entryman the evidence was, in substance, as follows:

The witness W. L. Kinsey testified that the land was all open so that stock ranged across it and he rode back and forth over it frequently looking for stock, and that the only fence was on the east side on the Cooper land (Tr. pg. 46).

The witness John Gardispee testified that between April, 1904, and the middle of June, 1904, no fencing was done on the place (Tr. pg. 46); that his stock ran right across the range right in there (Tr. pg. 46); during that time he could cross back and forth over the land while driving stock and that his stock ranged across it at that time (Tr. pg. 46).

The witness John Gardispee Jr. testified that there was a fence on the east side of the land (Tr. pp. 50-51); that he was across the land hunting horses and cattle which ran in there quite a lot (Tr. pk. 51); that for two or three years after 1902, he knew of only one

fence, the north and south line fence on the east side (Tr. pg. 51); that there was no fence enclosing it so as to keep stock out, it was open so that stock would range all over it (Tr. pg. 51).

The witness Frank Kinsey testified that before final proof was made he never saw any improvements on the land except the cabin, no other buildings, fencing or corrals of any kind (Tr. pg. 57); that he was back and forth over it while hunting stock, it was all open range (Tr. pg. 57); it was so open that stock of all kinds ranged back and forth across the land (Tr. pg. 57-58);

The witness Frank D. Cooper testified that Mahaffy told him he was going to fence the land and wanted to know if he could join his fence on the end, that is the east end, that would be eighty rods, and the witness finally sold him forty rods of fence for thirty-five dollars (Tr. pg. 75); that he didn't go around to see how much he had fenced or what he had made in the way of fences in addition to that he bought (Tr. pp. 79-80); that when the land was purchased it was not enclosed (Tr. pp. 83-84); that the witness did not remembr whether or not he built the fence after the land was purchased (Tr. pg. 84).

The witness William Kirkland testified that there was a fence on the east side of it and that was all the fence he ever noticed (Tr. pg. 91); that he saw a fence running in the other direction, but as to that being Mahaffey's fence he could not say (Tr. pg. 91).

The witness Richard T. Loss testified that there

was a fence on the east side of the land and other fences there, but that he did not pay any attention to them (Tr. pg. 95); that there were no fences running at right angles to the fence on that side (Tr. pg. 95).

The witness Charles Wise testified that there was some fence there, but not a great deal, and that he never went around it, and did not notice any fence running across from the east fence (Tr. pg. 97). The witness Wise, when a final proof witness, testified that the land was all enclosed with a fence (Tr. pg. 67). He now testifies that while there was some fence there it was not a great deal and he never went around it and never noticed any fence running across from the east fence. If the testimony of the witness given on the trial of this case was true, then as a final proof witness he testified to facts regarding which he had no knowledge whatever.

The witness Bennett, who as a Special Agent of the General Land Office, testified that when he made his examination in July, 1909, he found the land enclosed with land belonging to the witness Frank D. Cooper, the father of the intervenor (Tr. pp. 55 and 56).

The testimony of the witnesses the two Gardispees and the two Kinseys was direct and positive that the land was not enclosed with a fence and that the only fence was on the east side on the land belonging to the witness Frank D. Cooper, that the land was all open range across which stock of all kinds ranged at

all times. This evidence is not contradicted by any of the witnesses for the intervenor, but is corroborated by the evidence of some of them, namely Kirkland and Loss.

In his final proofs the entryman Mahaffey could not and did not attempt to show any cultivation of the land, but based his right to receive a patent on the fact that the land was grazing land and that he had used it for such purpose.

If the land was not enclosed so as to exclude and segregate it from the public range, and the evidence clearly shows that it was not, then the entryman, while he may have permitted his stock to graze on the land, permitted them to do so in common with other stock belonging to other persons, and the use of such land was not restricted to his own stock but was at all times part of the public domain and public range. And the entryman by failing to either cultivate the land or to enclose the same and use it for grazing purposes, excluding and segregating it from the public range, wholly failed to comply with the homestead laws, and his proofs were false and fraudulent.

We therefore, respectfully submit that the evidence was and is sufficient to sustain the allegations of the bill of complaint, and shows that the entryman Mahaffey did not comply with the homestead laws, either as to residence upon or use of the land, and that his final proofs were, therefore, false and fraudulent, and the court erred in holding and finding that

the evidence was insufficient to sustain the allegations of the bill of complaint.

The remaining question to be determined is whether or not the Intervenor was a purchaser in good faith for a valuable consideration; that is, whether he purchased without notice or knowledge of the fraud perpetrated by the entryman in acquiring the land.

In the bill of complaint the Intervenor was not made a party defendant, but after the action was instituted appeared as an Intervenor, setting up in his answer in intervention by way of defense to the cause of action contained in the bill of complaint, the fact that he was a purchaser in good faith, for a valuable consideration and without notice of any fraud committed by the entryman, and without notice that the complainant claimed that the entryman had committed fraud in the acquisition of the land.

The burden of proof was on the Intervenor to show that he purchased in good faith and paid a valuable consideration for the land.

“The burden was upon him to produce satisfactory proof that he purchased in good faith and paid value. His testimony that he ‘purchased that land in good faith’ and paid a ‘money consideration’ does not constitute such proof. Nor is the recital in his deed of the payment of a money consideration sufficient proof.”

Cooper v. United States, 220 Fed. 871. (CCA 9th Circuit).

The testimony shows that the intervenor was, at the

time of the purchase and the execution of the deed by the entryman Mahaffey, eleven or twelve years old (Tr. pp. 85 and 90); that the witness Frank D. Cooper was his father and made the purchase for the intervenor and that the intervenor had no knowledge of the purchase of the land until after it had been fully consummated, Frank D. Cooper carrying through and completing the entire transaction for the intervenor and without his knowledge until after the transaction was entirely closed up and completed (Tr. pp. 76, 81, 83, 88, 89, 90).

The father of the intervenor, Frank D. Cooper, having acted as his agent and representative in the purchase of the land, the burden of proof was on the intervenor to show that Frank D. Cooper made the purchase in good faith and for a valuable consideration.

The Frank D. Cooper, father of the intervenor, and a witness in this case, is the same Frank D. Cooper who was a party to the two actions reported in 220 Fed. at pages 867 and 871.

The testimony on the part of the intervenor is, with reference to the purchase of the land by Frank D. Cooper for the intervenor, in substance, as follows:

The witness Frank D. Cooper testified that the first conversation he had with Mahaffey with reference to the purchase of the land was at Cascade on June 15, 1904 (Tr. pg. 76); Mahaffey did not want to sell the land to him, but to his son the intervenor

(Tr. pg. 76); said he wanted to sell out to Nelson and wanted \$350.00 (Tr. pg. 76); witness studied a while and finally, having Nelson's money, invested it for him, and made out a check for him for \$300.00 and Mahaffey gave the witness a deed to the intervenor (Tr. pg. 76); that previous to that time the witness had bought other lands of like character in that vicinity, from time to time, and also bought some Northern Pacific land (Tr. pg. 77); that at that time he had very little knowledge of the Mahaffey land (Tr. pg. 77); that witness owned the land adjoining the Mahaffey land on the east (Tr. pg. 80); that witness had purchased lands from homesteaders in that vicinity, and also some from the Northern Pacific Railroad Company (Tr. pg. 81); that during the time witness was there he had acquired about nineteen thousand acres (Tr. pg. 81); a large amount was purchased from homestead entrymen after they had made final proofs (Tr. pg. 81); Mahaffey wanted the intervenor to purchase it (Tr. pg. 81); the purchase was actually made and deed delivered on June 15, 1904, the same day that he made his final proof (Tr. pg. 81); witness did not know whether or not Mahaffey knew Nelson had any money (Tr. pg. 81); prior to that time the witness had never purchased any lands for the intervenor (Tr. pg. 81) that witness was on the Mahaffey place in 1900, and may have been over the land before that, but not anyways soon (Tr. pg. 82); that he knew the land all around there in a general way and thought that between 1900

and the time he bought the land he was there, but was not positive and did remember seeing him (Tr. pg. 82); that witness knew all of the land over in that country (Tr. pg. 82); knew the general character of the land, knew it in a general way (Tr. pg. 82); that he never went to examine any of the lands he bought (Tr. pg. 82); knew the general character of the land and knew it in a general way (Tr. pg. 82); that he never went to see any of the land he bought, never saw a piece of it (Tr. pg. 82); that he never examined any land of all the land he bought, but knew the general character of all of it (Tr. pg. 82); after the land was purchased it was used in common with the other land owned by the witness (Tr. pg. 83); used practically the same as his other lands (Tr. pg. 83); that when it was purchased it was not enclosed (Tr. pg. 84).

From the evidence introduced by the intervenor on the point, we find the following conditions existing at the time the witness Frank D. Cooper purchased the land taking the deed in the name of the intervenor: Frank D. Cooper had lived in that neighborhood for a number of years, he had acquired about nineteen thousand acres of land, a large portion of it being purchased from homesteaders, after they had made final proofs, and some of his land adjoining the land of the entryman Mahaffey; the land was purchased on the same day that Mahaffey made final proof; that Mahaffey asked the witness Cooper to purchase the land for the intervenor although Mahaffey did not know

that witness Cooper had ever theretofore purchased any land for the intervenor who was only eleven years of age; that the witness never examined any of the land he purchased before purchasing it, going ahead and purchasing it without knowing the kind of improvements or the value of the improvements which had been placed on it; that he knew at the time he purchased it that it was not enclosed with a fence (Tr. pg. 84), and that consequently he must have known that the entryman had not complied with the homestead law.

The evidence shows that Frank D. Cooper was a man of large affairs, that he was all over that particular country more or less, all of the time, looking after his sheep and other interests. It is not reasonable to suppose that such a man would go ahead and buy a piece of land for his son when he knew practically nothing about the land, or the improvements thereon, and particularly when the entryman offered the land for sale on the very day he made his final proof, which fact alone should have been sufficient to have placed a prudent man upon inquiry.

The evidence shows that some of Frank D. Cooper's land adjoined this very tract of land and that he had some sheep pens on this tract of land (Tr. pg. 47, W. L. Kinsey, and pg. 50, John Gardispee); and that Cooper's men were working there with a foreman (Tr. pg. 47); that in April, 1904, Mahaffey was working for Frank D. Cooper (Tr. pg. 46); that John Gardispee Jr. had seen him on Cooper's place

cooking several times (Tr. pg. 52); and that Frank Kinsey had seen Mahaffey in the spring of 1904 working for Cooper at his sheep camp about one-half or three quarters of a mile east of the Mahaffey land (Tr. pg. 58).

In the case of Cooper vs. United States, 220 Fed. 867, the appellant Cooper, being Frank D. Cooper, witness and father of the intervenor in this case, purchased the land from the entryman on the same day on which the entryman made final proof, and the facts and circumstances as shown by the evidence in that case, being so nearly identical with the facts and circumstances proven in this case we believe that the argument contained in the appellee's brief in that case is particularly applicable here and we therefore quote therefrom the following:

“Appellant seems to argue that because he purchased this land from Gilbert without any knowledge that the Untied States claimed that Gilbert had not complied with the law that he is an innocent purchaser for value. But a man can not sit idly by and live in the neighborhood of a piece of land from 1876 to 1904, the time when final proof was made and the land bought by him, and say that he was innocent of what Gilbert had done. A man cannot close his eyes, as Cooper desires this court to believe he did, and then profit by his endeavors to notice nothing. He must have known on July 15, 1904, when he purchased the land, that Gilbert had worked for him herding sheep for several years prior there-

to, and knowing that Gilbert was so in his employ, he, an experienced sheepman, knew that Gilbert did not herd sheep at some remote portion of Cooper's 21,000 acres and return to the claim every night, or even maintain a 'continuous residence' for five years as the law required a homesteader to do. It was not incumbent upon the United States to notify Cooper, or anyone else, that it would insist on a cancellation of the patent within the statutory period, if it discovered that Gilbert had practiced a fraud in making his final proof. Indeed, Cooper was so anxious to secure this land that he could not wait until a patent had issued for it, but purchased it July 15, 1904, less than thirty days after final proof was made and five and one-half months before patent issued. It is absurd to say that a man who owns a large tract of land, 'a man of large affairs,' is by reason of that fact not expected to know what is being done with a piece of land, over which he built a road and in whose service the entryman had been engaged for several years prior to the final proof and purchase."

"The mere fact that the title he bought was nothing but one based on a final receipt issued less than thirty days before the purchase was a thing that should have put him upon inquiry and if he neglected to inquire into the bona fides of the entry his neglect is no protection to him. His 'large affairs' and enormous land holdings alone show that he was a man well versed in the ways of the world and particularly with all of the details of acquiring the public domain. Cooper's pretended ignorance of what Gilbert had done on the claim and lack of knowledge as to what residence a man had in such close proximity for a

period of over five years is a circumstance in itself that brands Cooper with a guilty knowledge of the fraud."

And we also desire to quote from the appellee's brief filed in the case of Cooper vs. United States, 220 Fed. 871, as follows:

"It seems incredible that a man of Cooper's business ability should have so conducted himself in and about the purchase of land that he would purchase even one hundred and sixty acres of grazing land without at least remembering whether he had ever seen it prior to such purchase. He testified that he lived in the neighborhood from 1876 to 1910 and in all but three years of such time had had a homestead in said township with the claim under consideration. His ownership of 21,000 acres of land in the vicinity of this claim does not bespeak well for the truthfulness of his statements that he knew nothing about the Freeman entry before he purchased it. Is it possible that a man, who purchased such a vast tract of land as is shown by the record Cooper did, would pay two, four or six hundred dollars or more, without having examined any portion of it prior to paying the consideration therefor."

"In cases of this kind it is seldom, if ever, possible to secure direct proof of the fraudulent acts of a party, for from the very nature of the things, persons, who are engaged in the business of acquiring land from the United States and building up a vast domain such as Cooper had, do not work openly. On the contrary, such per-

sons are careful that no written evidence of their scheme to obtain the land is obtainable and no one except the entryman who is duped into taking up the land for a few paltry dollars is present. Indeed, it is remarkable that a man of apparently good standing in the community will go into the business of acquiring land, as Cooper did in the present instance, and, when the United States objects to its land laws being abused, protest that they have always been acting in good faith and are purchasers for a valuable consideration, when in truth, and in fact they have watched men like Freeman file upon claims and seen the land laws more honored in their breach than observance. The most unobserving persons in Cooper's position would have been compelled to notice that Freeman's entry was a sham and a fraud and, unless like Cooper, were desirous of acquiring it, would have denounced it for what it was a palpable attempt to defraud the government."

In the case of Cooper vs. United States in 220 Fed. 871, in which it was held that the defendant Cooper was not a purchaser in good faith for a valuable consideration, but purchased with notice of the fraud committed by the entryman, the purchase was made by Frank D. Cooper on July 15, 1904, the very same day on which he purchased the land involved in this action, in that case taking the deed in his own name, in this case taking the deed in the name of his son Nelson Cooper, the intervenor herein. It might also be ob-

served that Mahaffey, the defendant in this case, was one of the final proof witnesses for the entryman in that case, and that Wise, one of the witnesses in this case, was the other final proof witness in that case. And in the case of United States vs. Cooper, 220 Fed. 867, in which case it was also held that the defendant Cooper purchased with notice of the fraud committed by the entryman, final proof was made on August 18, 1904, and the land purchased by Cooper on the same day, just a month after the final proof and purchase in this case. And in that case Richard T. Loss and William S. Kirkland, who are witnesses in this case, were the entryman's final proof witnesses.

In view of the facts as disclosed by the evidence in this case, and all of the circumstances surrounding this case and the two Cooper cases hereinbefore referred to, it seems to us that there can be no question but what Frank D. Cooper not only knew of the fraud perpetrated by the entryman Mahaffey, but took the deed in the name of the intervenor for the sole purpose of concealing from the government the fact that he himself was the purchaser of this tract of land.

We therefore submit that the testimony was and is sufficient to sustain the allegations of the complaint and that the intervenor, instead of showing himself to be a purchaser in good faith for a valuable consideration, has shown that his agent and representative, Frank D. Cooper, at the time he made the purchase, had full notice and knowledge of the fraud of the en-

tryman Mahaffey and the court erred in dismissing the bill of complaint and in ordering and entering the decree herein.

Respectfully submitted,

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